IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

NO. 257

CLIFFORD LITTELL LeDUC,
Petitioner,

vs.

NORMAL PARK PRESBYTERIAN CHURCH, an Illinois religious corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CLIFFORD LITTELL LE DUC,
Petitioner, Pro Se.

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NORMAL PARK PRESBYTERIAN CHURCH, an Illinois religious corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Summary Statement of Matter Involved.

Your petitioner, The Reverend Clifford Littell Le Duc, a duly ordained minister of the Presbyterian Church, praying for a writ of certiorari to review a decision of the

United States Circuit Court of Appeals for the Seventh Circuit, respectfully submits:

This is a civil action filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, on January 13, 1943 for money damages for breach of a civil contract entitling petitioner to a salary and pension money for his services as pastor of the respondent church (R. 2-5). *Petitioner demanded a jury trial* (R. 3). Respondent, a church corporation (to be carefully distinguished from its *Congregation*), *without filing any answer*, moved to dismiss the complaint and for summary judgment (R. 6-30). The motion itself was sworn to (R. 8); and various affidavits were filed by both parties (R. 32-42, 49-77).

The District Court, *without granting a jury trial*, allowed the motion for summary judgment, *made certain findings of material fact which were squarely in conflict with the summary judgment*, drew conclusions of law (R. 90-111), and on June 29, 1943 entered a final summary judgment in respondent's favor (R. 111). From this final judgment petitioner appealed (R. 112). On May 4, 1944 this decree was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit in an opinion written by District Judge Walter C. Lindley (Circuit Judges Evans and Sparks concurring).

The whole issue before this Court is whether a summary judgment may properly be sustained under Federal law (Rule 56 of the Federal Rules of Civil Procedure) in favor of the respondent (the defendant in the trial court) *when such summary judgment is squarely in conflict with statements of material fact in petitioner's affidavits. If these statements of material fact by petitioner are true, such*

facts absolutely preclude the valid entry of any such summary judgment for respondent in the trial court in this case.

It was clearly established by the sworn pleadings and affidavits that petitioner and respondent had entered into a valid written contract (or "pastoral call") on or about September 17, 1928, to which civil contract The Presbytery of Chicago (hereinafter also called "Presbytery") was a third party (R. 4-5, 44). This contract was in full force and effect for twelve years between 1928 and 1940, during which period petitioner fully performed all covenants on his part to be performed thereunder (R. 3). By its terms the contract was to continue in full force and effect "during the time of your (petitioner's) being and continuing to be the regular Pastor of this Church (respondent)" (R. 4). *Only death or dissolution of the pastorate by Presbytery in strict compliance with Presbyterian Law could end the contract* (R. 65).

On December 2, 1940 Presbytery purported to dissolve petitioner's pastorate and thereby terminate the contract; and thereafter respondent prevented petitioner from performing his pastoral duties and failed and refused to pay him more than $10,000 which was due petitioner for his salary and pension money under the contract (R. 3, 78). These were the money damages for which this action was brought (R. 3).

That the manner (or "procedure") in which Presbytery acted in purporting to dissolve the pastorate and thereby to terminate the contract was *in plain violation* of the written Constitution and Laws of the Presbyterian Church in the United States of America which governed petitioner's pastorate was established by the decision of the General Assembly and its Permanent Judicial Commission on May

25, 1942 (R. 92-9). The General Assembly in no uncertain terms there *condemned* the "procedure" of Presbytery (R. 95, 97-9), as well as the "procedure" of The Synod of Illinois (hereinafter also called "Synod"), saying they had committed "inexcusable error" by denying both petitioner and respondent "a hearing as required under the plain provisions of Chapter XII, Section 12, of the Book of Discipline" and had also committed other "incredible errors" which were "not mere technicalities" by denying petitioner the rights "accorded him by our Constitution" (of the Presbyterian Church) (R. 96).

The District Court correctly found that under the General Assembly's own decision both Presbytery and Synod had violated the Constitution and Laws of the Presbyterian Church by their procedures in dissolving the pastoral relation between petitioner and respondent (R. 79); and the Circuit Court of Appeals likewise found that "The General Assembly remarked that *the procedure followed was not in accord with the Constitution and Laws of the church*" (R. 123).

These "inexcusable" and "incredible" errors which Presbytery had committed were all in defiance of the Constitution and Laws of the Presbyterian Church (R. 60-1, 99). Synod also committed other "inexcusable" and "incredible" errors (R. 96-7).

In passing we point out that the Circuit Court's finding that petitioner was granted "hearings before the Commission," as distinguished from Presbytery which alone had the power to conduct such a hearing (R. 124), is squarely contradicted by petitioner's Complaint filed with the General Assembly (p. 11, 13-23, 25, 28-9) and by petitioner's

affidavits (R. 60, 63). The General Assembly correctly held that no hearing before this "administrative commission" was sufficient on which to base a dissolution (R. 96, 98-9).

The General Assembly, however, affirmed the dissolution of the pastorate, thereby purporting to deprive petitioner of his civil rights to his salary and pension money. The General Assembly in so doing necessarily based its action upon two grounds:

First, that the General Assembly had *original jurisdiction* itself to hear the merits of the controversy *de novo* (before its Permanent Judicial Commission) (R. 96); and, second, that *both petitioner and respondent did in fact request* the General Assembly (or its Permanent Judicial Commission) "to dispose of the action upon the merits" (R. 96, 99).

Petitioner by his affidavits clearly established: *First*, that the Constitution and Laws of the Presbyterian Church have never granted any original jurisdiction to the General Assembly to hear *de novo* the issue of dissolution of a pastorate *upon the merits*, the *sole jurisdiction* of the General Assembly thereunder being *to review* the actions of the lower judicatories, (*i. e.*, Presbytery and Synod); and, *Second*, that *neither petitioner nor respondent ever did in fact request* the Permanent Judicial Commission or the General Assembly to hear the case *de novo* upon its merits (R. 63, 68).

The question as to whether the General Assembly had any *original jurisdiction, as distinguished from its appellate jurisdiction to review the actions of Presbytery and Synod*, was a question which requires a consideration of the ecclesiastical law of the Presbyterian Church. That

the General Assembly had no such power amply appears from Chapter XVII, Section 1 of the Constitution of the Presbyterian Church which vests the right to dissolve a pastorate exclusively in Presbytery, as petitioner's affidavits clearly disclosed (R. 95, 97; Constitution, Chap. XVII, Sec. 1; Book of Discipline, Chap. XII, Sec. 12, pp. 417-8). Under Presbyterian Law, the General Assembly's sole power, therefore, was to reverse the dissolution by Presbytery and Synod for their "incredible" and "inexcusable" errors aforesaid, and remand the case.

But whether or not the General Assembly had original jurisdiction to dissolve the pastorate, the General Assembly itself correctly held that *it could only do so if both petitioner and respondent did in fact request the General Assembly "to dispose of the action upon the merits"* (R. 96); for the General Assembly proceeded to find that *"both the complainant (petitioner) and the respondent requested us to dispose of the action upon the merits* and, despite the plain errors of Synod, the ultimate decision of the case turns on the action of Presbytery and *we have proceeded to that review"* (R. 96) . . . *"We have acceded to the requests of the parties* and we pronounce the judgment which should have been entered by the Synod of Illinois if it had properly reviewed the complaint" (R. 99). In other words, by these findings the General Assembly itself recognized that, *unless both petitioner and respondent in actual fact requested the General Assembly to hear de novo the merits of the controversy*, the General Assembly under the Constitution had no power to dissolve the pastorate.

The Circuit Court's opinion also held that it was only because petitioner *"received a fair, judicial hearing, brought about at his own behest*, on the complaint pre-

sented to the General Assembly" that the dissolution was effective (R. 124).

Petitioner's affidavits, however, squarely stated that neither petitioner nor respondent ever did in fact request the General Assembly or its Permanent Judicial Commission to consider or decide the issue of the dissolution of the pastorate. We quote from petitioner's affidavit filed in the District Court as follows:

> "Neither affiant (petitioner), nor the Normal Park Presbyterian Church, an Illinois Corporation, nor The Presbytery of Chicago, nor the Synod of Illinois *ever submitted the matters contained in affiant's Complaint to said Permanent Judicial Commission or to said General Assembly for decision, or ever did request either said Permanent Judicial Commission or said General Assembly to consider, dispose of or decide affiant's Complaint or the matters therein referred to upon their merits . . .*" (R. 63).

The respondent filed a *directly contradictory* reply affidavit (R. 74), stating that petitioner "and said Church bodies, including the Synod of Illinois, *asked the Commission* (the "Permanent Judicial Commission of the General Assembly") *to hear the matter and to determine it upon its merits*" (R. 74).

Thus the parties were disputing, by their mutually contradictory affidavits, the "key" question of fact in this case.

The General Assembly thus erroneously found (1) that it had *original jurisdiction* to pass upon the issue of the dissolution in violation of Chapter XVII, Section 1, of the Constitution, and Chapter XII, Section 12 of the Book of Discipline, and (2) that *both petitioner and respondent had requested the General Assembly to try the issue de*

novo on the merits in the face of petitioner's square affidavit to the contrary (R. 96, 99).

The trial judge, having noted this erroneous finding of fact by the General Assembly (R. 79), *correctly found that "neither plaintiff (petitioner) nor defendant (respondent) ever requested the Permanent Judicial Commission of the General Assembly to consider, decide or dispose of his (petitioner's) complaint upon the merits"* (R. 80), *because petitioner "further asserts in his affidavit that neither he nor the Presbytery of Chicago, nor the Synod of Illinois ever submitted the matters contained in his complaint here to said Permanent Judicial Commission or the General Assembly for decision or requested said Permanent Judicial Commission of General Assembly to consider, dispose of or decide affiant's (petitioner's) complaint or the matters therein referred to upon their merits"* (R. 81).

To boil the matter down, therefore, the facts are these:

1. The issue of the dissolution of the pastorate was never submitted for a hearing *de novo* upon the merits to any ecclesiastical court other than the Presbytery of Chicago, and, particularly, was never submitted to the General Assembly or its Permanent Judicial Commission.

2. Presbytery had the sole power of original jurisdiction to pass *de novo* upon the merits of the dissolution of the pastorate under the Constitution and Laws of the Presbyterian Church.

3. The General Assembly's sole power was to reverse the action of Presbytery and Synod for "incredible" and "inexusable errors," and remand the case to Presbytery.

4. Neither petitioner nor the Congregation was ever granted any hearing before Presbytery (as distinguished from its mere "administrative commission") on the issue of dissolution, as required by Chapter XVII, Section 1 of the Constitution, and Chapter XII, Section 12 of the Book of Discipline.

5. The summary judgment in this case is squarely in defiance of petitioner's affidavits asserting the foregoing facts, such summary judgment thereby effectively depriving petitioner of his right to a jury trial in the District Court upon the merits of his claim for salary and pension under his contract.

Judge Lindley, the District Judge who wrote the opinion in this case, is regularly assigned to the District Court of the United States for the Eastern Division of Illinois, sitting in East St. Louis, Illinois. He shares that court with the Honorable Fred L. Wham, Judge of the same District Court. *Although it does not appear in the record in this case,* Judge Wham was a member of the Permanent Judicial Commission of the Synod of Illinois at the time Synod committed its "inexcusable" and "incredible errors" in denying petitioner's complaint to Synod "without giving the parties a hearing as required under the plain provisions of Chapter XII, Section 12, of the Book of Discipline" (R. 96). To petitioner, who speaks as a layman, it would seem that Judge Lindley should have disqualified himself from sitting in this case.

The granting of a summary judgment squarely in conflict with petitioner's affidavits of material fact in the trial court, without any evidence or any hearing on the merits, *and without granting petitioner a jury trial,* clearly constitutes, petitioner submits, a violation of Rule 56 of the

Federal Rules of Civil Procedure and of the Fifth and Seventh Amendments to the Federal Constitution.

Statement of Basis of this Court's Jurisdiction.

The decision of the Circuit Court of Appeals for the Seventh Circuit in this case granting respondent a summary judgment directly conflicts upon a question of Federal law with the explicit provisions of Rule 56 of the Federal Rules of Civil Procedure, with the Seventh Amendment to the Constitution preserving petitioner's right to a trial by jury, and with the Fifth Amendment providing that petitioner shall not be deprived of his civil contractual rights "without due process of law."

The Questions Presented.

There are two questions presented:

1. Is petitioner to be deprived of his civil contractual rights to his salary and pension money under a valid civil contract by a summary judgment under Rule 56 of the Federal Rules of Civil Procedure, when such summary judgment is necessarily based upon material facts *which are directly controverted by petitioner's sworn affidavits filed in opposition to the entry of such summary judgment?*

2. Is petitioner to be deprived of his right to a jury trial of controverted issues of material fact, as disclosed by his affidavits filed in opposition to respondent's motion for summary judgment, when no such judgment could lawfully be entered unless the facts asserted in petitioner's affidavits are found to be unsupportable or untrue upon a trial by jury on the merits of the controversy?

Reasons for the Allowance of the Writ.

Until the decision in this case, Rule 56 of the Federal Rules of Civil Procedure and the Fifth and Seventh Amendments to the Constitution have *invariably* been construed to prevent the entry of a summary judgment which is squarely in conflict with allegations of material fact contained in affidavits filed in opposition to the motion for summary judgment. It therefore amply appears that the decision of the Circuit Court of Appeals for the Seventh Circuit in this case is *directly in conflict upon a question of Federal law*, not only with Rule 56 of the Federal Rules of Civil Procedure, but also with the Fifth and Seventh Amendments of the Federal Constitution, as well as with the decision of this Court in *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620 (opinion by Mr. Justice Jackson, rendered March 27, 1944), and with many other decisions in the various Circuit Courts of Appeals construing the same (see Argument below).

The question involved is important. The granting of a summary judgment under Rule 56 of the Federal Rules of Civil Procedure effectively deprives the losing party of his right to a trial by jury of all controverted issues of material fact which a jury should properly pass upon. To deprive a litigant of his right to a jury trial, by the granting of a summary judgment which is squarely in conflict with affidavits containing essential facts utterly inconsistent with the summary judgment, is to deprive the losing party not only of his right to a trial by jury under the Seventh Amendment, but also of his right to "due process of law" under the Fifth Amendment to the Federal Constitution.

WHEREFORE, petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the

United States Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court, on a day to be designated, the full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; that said final order of said Circuit Court of Appeals be reviewed or altered by this Honorable Court; and petitioner also prays for such other, further or different relief as may seem proper.

And this petitioner will ever pray, etc.

CLIFFORD LITTELL LE DUC,
Petitioner, Pro Se.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The United States Circuit Court of Appeals for the Seventh Circuit rendered its opinion in this case on May 4, 1944. The opinion is set forth on pages 121 to 125 of the record.

Jurisdiction.

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Seventh Circuit on May 4, 1944. A writ of certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911 c. 231, § 240, 36 Stat. 1157 as amended February 13, 1925, c. 229, § 1, 43 Stat. 938).

Statement of the Case and Questions Presented.

For a statement of the case and of the questions presented see pages 1 through 12 above.

Specification of Errors.

The Seventh Circuit Court of Appeals erred:

1. In affirming the summary judgment of the District Court in cause No. 43C 24.

2. In not reversing the summary judgment of the District Court in cause No. 43C 24.

3. In finding that the record is clear that petitioner

received a fair judicial hearing, brought about at his own behest, on the complaint presented to the General Assembly.

4. In not finding that the record is clear that petitioner neither requested nor received a hearing *de novo* or determination on the merits of the issue of dissolution of his pastorate before the General Assembly.

5. In not finding that under the Constitution and Laws of the Presbyterian Church the General Assembly has no original jurisdiction to hear and determine the issue of dissolution of petitioner's pastorate.

6. In making findings of fact and conclusions of law directly contrary to the sworn statements of material fact contained in petitioner's affidavits filed in opposition to respondent's motion for summary judgment.

7. In failing to grant petitioner the right to a trial by jury of the issues of material fact raised by the affidavits filed in opposition to the motion for summary judgment.

8. In failing to reverse the summary judgment and remand the proceedings to the District Court with directions to grant a jury trial of the material facts upon the merits in the District Court.

ARGUMENT.

I.

The Presbyterian Church and all its judicatories are strictly subject to its Constitution and Book of Discipline.

That the Presbyterian Church in the United States of America is *strictly governed* by a written Constitution and Laws with which *all church action must comply* is beyond any possible dispute. It is a matter of common knowledge that it was one of the chief purposes of the Protestant Reformation in the Sixteenth Century to substitute a body of written law as the supreme and governing authority in the Christian church to replace the supreme authority which had previously been vested exclusively in the Bishop of Rome. For more than three centuries the Presbyterian Church has been *strictly and exclusively governed by its written Constitution or Form of Government and by its Book of Discipline.* Even the General Assembly itself cannot violate the Constitution and Laws of the Presbyterian Church; for in the Presbyterian Church the Constitution and Laws are supreme. The judicatories, including the General Assembly, are subordinate to the Constitution, not the Constitution to the judicatories (Presbyterian Digest, p. 323-6).

Petitioner cites three cases (out of scores) which trace the history of the Presbyterian Church for centuries past and establish the *absolute supremacy* of the Constitution

and the Book of Discipline over the judicatories, including the General Assembly itself:

Landrith v. *Hudgins*, 120 S. W. 783;
Gartin v. *Penick*, 5 Bush. (Ky.) 110;
Boyles v. *Roberts*, 121 S. W. 805.

II.

The Civil Courts will protect petitioner's right to his salary and pension if he had been deprived thereof by unconstitutional ecclesiastical procedure.

That a pastor's right to his salary and pension is a civil contractual right (and not a mere ecclesiastical right) is beyond dispute. While it has long been recognized that no secular court will interfere in any purely religious dispute involving only doctrinal or ecclesiastical matters, it has nevertheless been equally well established that the civil courts will take full cognizance of all civil rights and claims, whether the same involve contracts or property, even though the defendant may be a church or other religious organization. In considering whether a minister has been deprived of his civil contractual right to salary and pension, the civil court will examine the ecclesiastical law of the church in order to determine whether under its Constitution and Laws the ecclesiastical proceedings depriving any minister of his rights have been in full compliance therewith.

Wallace v. *Trustees of General Assembly of the United Presbyterian Church of North America*, 45 Atl. 84; 50 Atl. 762;
Kelly v. *McIntire*, 197 Atl. 736;
McDowell v. *Wilson*, 97 Atl. 100;
Woods v. *Humber*, 282 S. W. 834;
Marsh v. *Johnson*, 82 S. W. (2) 345;

Quinn v. *First Evangelist Baptist Church*, 135 Sou. 753;
Yanthis v. *Kemp*, 85 N. E. 976;
Grupe v. *Rudissell*, 184 Atl. 874;
Kedrovsky v. *Burdikoff*, 146 Atl. 613;
Taylor v. *Jackson*, 273 F. 345;
Schweiker v. *Husser*, 146 Ill. 399;
Bouldin v. *Alexander*, 15 Wall. 131;
Papailiou v. *Manusos*, 108 Ill. App. 272; 113 Ill. App. 316;
Evangelical Lutheran St. Paul's Congregation v. *Hass*, 187 N. W. 677;
Vaughan v. *Maynard*, 170 S. W. (2d) 897;
Mason v. *Lee*, 50 So. 625;
Trustees of Delaware, etc. Church v. *Ennis*, 29 Atl. (2d) 374.

Many of the above cases involved the removal of a minister; and the civil courts uniformly held that they were required to investigate the ecclesiastical law in order to decide whether the minister had been deprived of his rights within that law. Where, as in the *Wallace* case, the Supreme Court of Pennsylvania found that the General Assembly in removing the pastor had not acted in compliance with church law, the Supreme Court did not hesitate to find and hold that the minister was therefore "still entitled to hold the pastorate of the Jamestown Church" *and to retain all of his civil rights under his contract.* In disposing of the defense of *laches*, the Supreme Court held on the second appeal (50 Atl. 762) (p. 764): "Whatever force this might have on the amount of damages he (the minister) might claim from the Jamestown congregation, *it does not stop him from having his dismissal from the latter congregation declared unlawful by the civil courts.*"

In the case of *Taylor* v. *Jackson*, 273 F. 345, the Court of Appeals of the District of Columbia on appeal from the Supreme Court of the District considered the right of the plaintiffs to be restored to membership in the Florida Avenue Baptist Church. The Court said (p. 347): "No temporal rights of appellees being involved, our inquiry must be confined to an examination of the rules of the church organization, *for the purpose of determining whether there has been a substantial compliance with those rules.*" The Court held that a church member who had not received a notice required by the church law had thereby been deprived of his "*opportunity to be heard*" and that "*the order expelling him therefore was void*" (citing numerous decisions including *Bouldin* v. *Alexander*, 15 Wall. 131).

Similarly the Supreme Court of Illinois in *Schweiker* v. *Husser*, 146 Ill. 399, held that the office of pastor is "a property right . . . which a court of equity will recognize and protect," and *examined with great care the church law* to decide which of two contestants was entitled to the office. In doing so the Supreme Court was required to determine which was "the true and lawful General Conference of the Evangelical Association," which was analogous to the "General Assembly of the Presbyterian Church" in this case.

In examining into church law the civil courts give particular attention to whether *a full and proper hearing upon the merits of the controversy*, after due and proper notice, has been accorded in the ecclesiastical courts. For cases in which the action of the church tribunals has been reversed on the ground that *a full hearing upon proper notice was not granted*, we direct this Court's attention to:

Hatfield v. *DeLong*, 59 N. E. 483;

First Church of Christ Scientist v. *Rentzel*, 218 N. W. 652;
Powanda v. *Pido*, 155 Atl. 90;
Rock Dell, etc. Congregation v. *Mommsen*, 219 N. W. 88;
Woodrum v. *Burton*, 107 S. E. 102.

The foregoing cases not only show beyond any doubt that the secular courts will take jurisdiction of any controversy involving a civil contractual right, such as that of a minister to his salary and pension money, but will for that purpose examine ecclesiastical law to determine whether the action of the ecclesiastical judicatory was *regular and in conformity with the Constitution and Laws of the religious organization involved.*

These cases also show that *the strictest compliance with the ecclesiastical procedures is required*, especially where the issue is whether a full and proper hearing pursuant to notice has been had upon the merits of the controversy. The civil courts have not hesitated to overrule the action of the highest church judicatories, such as the General Assembly of the Presbyterian Church, if the church law has not been precisely and correctly followed and applied.

The General Assembly itself upheld petitioner's right in this case to sue for his salary and pension *in the civil courts.* It said that if petitioner "honestly felt that he had a claim for salary, . . . *he could resort to* either the ecclesiastical courts *or the civil courts to enforce his rights.* Before either the Commission or Presbytery had attempted to act on the dissolution of his pastoral relation he had resorted to the Civil Courts where his suit is still pending. . . . He does not ask this General Assembly to adjudicate his salary claim, and *the determination thereof, by his voluntary act, rests with the Civil Courts*" (R. 97).

III.

Petitioner's pastorate was not properly dissolved under the Constitution and Laws of the Presbyterian Church.

As indicated in the Statement of the Case above, the General Assembly found that Presbytery and Synod in this case had committed "inexcusable error" and "incredible errors" which were "not mere technicalities," but which denied petitioner the rights "accorded him by our Constitution" by denying both petitioner and respondent "a hearing as required under the plain provisions of Chapter XII, Section 12, of the Book of Discipline" and as provided in Chapter XVII, Section 1 of the Constitution (R. 95-9).

The General Assembly, however, purported to hear and dispose of the issue by dissolving the pastorate on its own account. As indicated in the statement above, there were insuperable obstacles to this action by the General Assembly:

1. The General Assembly had no power of original jurisdiction to dissolve the pastorate because the Constitution and Laws of the Presbyterian Church specifically vests such power exclusively in the local Presbytery (R. 95, 97; Constitution, Chap. XVII, Sec. 1; Book of Discipline, Chap. XII, Sec. 12, p. 417-8).

2. The General Assembly itself held that in order to dissolve the pastorate it was necessary for both petitioner and respondent to request the General Assembly "to dispose of the action upon the merits" (R. 96). The General Assembly found that *both petitioner and respondent had made this request* (R. 96, 99). So did the Circuit Court

of Appeals (R. 124). But it clearly appeared from petitioner's affidavit (R. 63), and the trial court itself correctly found (R. 80), that "neither plaintiff (petitioner) nor defendant (respondent) *ever requested* the Permanent Judicial Commission of the General Assembly to consider, decide or dispose of his (petitioner's) complaint upon the merits." The trial court also correctly found that petitioner "further asserts in his affidavit that neither he nor the Presbytery of Chicago nor the Synod of Illinois *ever submitted the matters contained in his complaint here* to said Permanent Judicial Commission or the General Assembly for decision, or requested said Permanent Judicial Commission or General Assembly to consider, dispose of or decide affiant's (petitioner's) complaint or the matters therein referred to upon their merits" (R. 81).

Thus upon two incontrovertible grounds the General Assembly of the Presbyterian Church violated its Constitution and Laws in (1) purporting to exercise original jurisdiction, which it did not have, to dissolve the pastorate, and (2) purporting to find that petitioner and respondent *had requested* the General Assembly or its Permanent Judicial Commission to act upon the issue of dissolution, in place of the local Presbytery in which the sole power to dissolve the pastorate was vested by the Constitution and Laws of the Church.

IV.

The summary judgment in this case violated Rule 56 of the Federal Rules of Civil Procedure and the Fifth and Seventh Amendments.

Rule 56 of the Federal Rules of Civil Procedure provides that no summary judgment may be entered unless "there is no genuine issue as to *any material fact* and that the moving party is entitled to a judgment *as a matter of law.*" (Emphasis supplied.)

It is obvious that the summary judgment entered in this case rests primarily upon the finding of fact by the General Assembly that a full hearing was granted to petitioner before its Permanent Judicial Commission and that petitioner requested that the General Assembly take jurisdiction *de novo* and dispose of the issue of dissolution upon its merits. The summary judgment cannot be valid if either (1) the General Assembly had no original jurisdiction to hear the issue of dissolution on its merits, or (2) if petitioner did not request such a hearing.

Petitioner's sworn affidavits in the trial court deny that the General Assembly had any original jurisdiction to hear the issue of dissolution upon its merits under Chapter XVII, Section 1 of the Constitution, and Chapter XII, Section 12, of the Book of Discipline of the Presbyterian Church (R. 95, 97). Plaintiff's sworn affidavits show that petitioner never did request the General Assembly to consider the issue of dissolution on its merits (R. 63).

This Court in the recent case of *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620 (decided March 27, 1944, opinion by Mr. Justice Jackson) clearly stated that "Rule 56 authorizes summary judgment only where the moving

party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. *American Insurance Co.* v. *Gentile Bros. Co.*, 109 Fed. (2) 732; *Whitaker* v. *Coleman*, 115 Fed. (2) 305."

All of the Circuit Courts of Appeals have with perfect unanimity (except for the single decision in the case at bar) ruled that "any substantial dispute as to a material fact forecloses summary judgment."

Associates Discount Corp v. *Crow*, 110 Fed. (2) 126;

Houghton Mifflin Co. v. *Stackpole Sons, Inc.*, 113 Fed. (2) 627 (Second Circuit);

Wyant v. *Crittenden*, 113 Fed. (2) 170;

Whitaker v. *Coleman*, 115 Fed. (2) 305 (Fifth Circuit);

McElwaine v. *Wickwire Spencer Steel Co.*, 126 Fed. (2) 210 (Second Circuit);

Miller v. *Miller*, 122 Fed. (2) 209;

Toebelman v. *Mo-Kansas Pipe Line Co.*, 130 Fed. (2) 1016 (Third Circuit);

Ramsouer v. *Midland Valley R. Co.*, 135 Fed. (2) 101 (Eighth Circuit);

Campana Corp. v. *Harrison*, 135 Fed. (2) 334 (Seventh Circuit);

Dewey & Almy Chemical Co. v. *American Anode Inc.*, 137 Fed. (2) 68 (Third Circuit).

It will be noted that, in Mr. Justice Jackson's opinion above quoted, he makes particular reference to *the right of parties to a jury trial*, saying "the purpose of the Rule is not to cut litigants off from *their right of trial by jury.*"

The Circuit Courts for the Fifth and Eighth Circuits, in the *Whitaker* and *Ramsouer* cases above cited, likewise held that the litigants' right to a jury trial should not be infringed by a summary judgment under Rule 56.

Until the decision of the Circuit Court of Appeals for the Seventh Circuit in the case at bar, none of the Circuit Courts of Appeals have allowed a summary judgment to stand which was based upon a finding of material (essential) fact which was squarely controverted by the opposing parties' affidavits, as in the case at bar.

The trial judge specifically found that petitioner's affidavits showed that petitioner never requested the General Assembly or its Permanent Judicial Commission to pass upon the issue of dissolution upon the merits (R. 80-1).

It follows that the following statement in the opinion of the Circuit Court in this case is absolutely in square conflict with, and in defiance of, plaintiff's affidavits:

> "Whatever the procedure, the record is clear that eventually plaintiff (petitioner) received a fair, judicial hearing, brought about at his own behest, on the complaint presented to the General Assembly. It is too late for him to complain now that the mechanics of procedure were not perfect."

The last sentence above quoted is somewhat astonishing *in view of the vigorous condemnation of these very "mechanics of procedure"* by the General Assembly itself (R. 95-9). It was just because these "mechanics of procedure" were so unfair to petitioner, that the General Assembly purported to decide the case *de novo* at a hearing before its own Permanent Judicial Commission.

The key error in Judge Lindley's opinion, therefore, is the statement that because petitioner "brought about at his own behest" a hearing before the General Assembly, "it is too late for him to complain now" (R. 124). This statement, as we have shown, is erroneous, and is directly and squarely controverted by both petitioner's affidavits and by the findings of the trial court.

In view of the very close association between Judge Lindley and Judge Wham, both of whom sit in the same District Court of the United States for the Eastern Division of Illinois, *petitioner submits that Judge Lindley should have disqualified himself from sitting in this case.* Judge Wham was actually a member of the Permanent Judicial Commission of the Synod of Illinois at the time that the Synod acted and was severely criticized for its improper "procedure" *in this very case.* Petitioner does not mean to imply any improper motive whatever on Judge Lindley's part. But consciously or unconsciously, Judge Lindley was dealing in his opinion adversely to petitioner with a matter with which Judge Wham had an official connection; and petitioner, with complete respect for Judge Lindley's integrity, submits that in that particular situation Judge Lindley should have disqualified himself to sit on the Circuit Court, to which he is not regularly assigned, in this case.

A petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit in this case is therefore respectfully prayed, to the end that petitioner shall be permitted a jury trial upon the merits of his case and shall not be denied his right thereto by a summary judgment which cannot stand if the facts as stated in petitioner's affidavits *and in the trial Court's findings* are true.

Respectfully submitted,

CLIFFORD LITTELL LE DUC,
Petitioner, Pro Se.

FILED
SEP 5 1944
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 297

CLIFFORD LITTELL LEDUC,

Petitioner,

vs.

NORMAL PARK PRESBYTERIAN CHURCH, AN ILLINOIS RELIGIOUS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

BENJAMIN WHAM,
Attorney for Respondent.

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BRIEF FOR RESPONDENT.

To the Honorable, the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

A brief statement of facts is deemed necessary to correct inaccuracies and omissions in Petitioner's statement.

The petitioner is a Minister who has, in the past four years, actively participated in litigation (three separate cases) against the respondent Church, of which he was Minister from September 17, 1928 to December 2, 1940. One of the three cases was filed in the Circuit Court of

Cook County, Illinois on November 8, 1940, went to the Illinois Appellate Court and leave to appeal was denied by the Illinois Supreme Court; a second case was vigorously litigated through the Ecclesiastical Courts of the Presbyterian Church, commencing in the Summer of 1940 and ending in May, 1942; and the third is the case before this court which was filed January 13, 1943 in the District Court in Chicago.

In order that a clear understanding may be had of this case, the third of said cases, it is necessary to outline briefly the facts of all three cases. But first the preliminary facts from 1928 to 1940 should be stated.

The respondent is a small Presbyterian Church located at 71st Street and Yale Avenue in Chicago (R. 28). On September 17, 1928, it engaged the services of the petitioner as a Minister. The agreement is known as a "Call". It is important to note that it fails to state any period of time for the employment. It does fix the salary at $5,000 per year, plus free use of the Manse, and contains a provision for a pension which required both parties to make regular payments to the Board of Pensions (R. 4).

The petitioner and his mother had free use of the Manse and the petitioner acted as Minister of the defendant Church until November 10, 1940 (R. 6-7). No payments were ever made by either party to the Board of Pensions (R. 28, 42). The salary of $5,000 per year was paid until about 1932. Then, because of the depression, partial payments were made on account of salary. After many conferences, at the annual meeting of the respondent Church and Congregation held April 5, 1933, participated in by the petitioner, by agreement of the parties, the salary was reduced to $2,400 per year as of April 1, 1933 (R. 28, 36), and the back salary was reduced in amount and later paid in full (R. 36; also p. 2 Add'l. Abst. in Ill. App. Court attached to affidavit of Wallace T. McAffee R. 37 and orig-

inal filed herein per stip. R. 120); and it was definitely agreed that the pension had been and was abandoned, no payments having been made by either party. As of April 1, 1936, the salary was raised to $2,500 per year (R. 9, 38). The salary, as reduced, was paid in full to January 1, 1941, although the petitioner rendered no services after November 10, 1940 (R. 32, 33, 6-7).

In the Spring of 1940, the petitioner demanded additional salary (R. 9; Add'l. Abst. 3). Some of the Church members had become dissatisfied with the petitioner. The increase in salary was refused and Presbytery was requested to investigate the situation between the Minister and the Church and Congregation. After a preliminary investigation, Presbytery appointed a Commission. It held repeated hearings, at which petitioner, as well as the respondent and its members, were present and introduced evidence. A voluminous record was thus compiled. The Commission attempted to adjust the matter in a number of ways, but the petitioner refused to consider any such suggestions. Finally the petitioner told the Commission that he had been advised by a lawyer that he had a good case against the respondent for the difference in salary paid him under the 1933 reduction and the $5,000 set forth in the "Call"; and also for the pension for the past twelve years. Thereafter, on November 1, 1940, the plaintiff assigned his entire claim which totaled approximately $25,000 to Michael J. Norton, an insurance man, for $10 (R. 9, 10, 39).

The Case in the State Court.

On November 8, 1940, Norton filed suit against the respondent in the Circuit Court of Cook County, Illinois (R. 10). The complaint contained two counts: A law count for the unpaid salary and a chancery count for the pension, both being limited to the period ending November 1, 1940.

The law count was tried before a jury, resulting in a verdict for the respondent. The respondent's motion to dismiss the chancery count was allowed by the Court "for want of equity." On appeal to the Illinois Appellate Court, the lower court was sustained on both counts. (*Norton* v. *Normal Park Presbyterian Church,* 318 Ill. App. 233.) An abstract opinion appears in the printed volume but the complete opinion appears commencing at page 34 of the Record. A petition for leave to appeal was filed in the Illinois Supreme Court and denied October 13, 1943 (Ill. App. Adv. Sheet, Vol. 320, No. 4, p. ii). The court will find in the Record a copy of the law count (R. 16); a copy of the chancery count (R. 18); a copy of the plaintiff's Answer relative to the pension (R. 25); a copy of the motion to strike the chancery count (R. 26); a copy of the interrogatories and answers of the jury, the judgment of the court on the law count, and the decree of the court on the chancery count (R. 27, 28).

These show that both counts were decided *on their merits and did not go off on the technicality of the assignment to Norton* (R. 27, 34-42). They further show that it was decided that the salary had been lawfully reduced so there was no claim for salary beyond $2,500 per year and it had been paid. They further show that it was decided that the pension had been *abandoned* by mutual agreement of the parties (R. 52; Add'l. Abst. 11) and furthermore that the petitioner and his assignees were barred by *laches* (R. 26).

The Case in the Church Courts.

As a consequence of the litigious attitude and actions of the petitioner as above outlined up to December 2, 1940, it became apparent that the continuance of the petitioner as Minister of respondent Church could only result in harm to the defendant Church. Consequently, the Commission,

on December 2, 1940, reported to an open meeting of Presbytery that the petitioner should be removed as Minister of defendant Church. Thereupon Presbytery in open meeting took said action and removed the petitioner as Minister of respondent Church on December 2, 1940.

Thereafter the petitioner appealed to the Synod of Illinois which likewise referred the matter to its appointed Committee on Judicial Business. The appeal was denied by the Synod on the report of that Committee. Thereupon the petitioner appealed to the General Assembly.

The appeal was heard by the Permanent Judicial Commission of the General Assembly. It "heard the detailed oral arguments of both parties" and "considered the extensive briefs filed in their behalf" (R. 12). On May 25, 1942, it affirmed the action of the Presbytery of Chicago.

The court will find the opinion of the Permanent Judicial Commission of the General Assembly set out in full in the Record commencing at page 8. The case is entitled "*Reverend Clifford Littell LeDuc* v. *Synod of Illinois. In re Normal Park Presbyterian Church, Chicago, Illinois, Non-judicial Case No. 2.*"

This opinion and the affidavit of William McInnes, Stated Clerk of Chicago Presbytery who represented the Chicago Presbytery and the Synod of Illinois at the hearing of petitioner's appeal before the Permanent Judicial Commission of the General Assembly (R. 73, 74), show that the petitioner represented himself at the hearing and spoke at great length and that extensive briefs were filed on his behalf which were considered by that Commission, that both lower Church bodies (Presbytery and Synod) and the petitioner asked the Commission to hear the appeal on its merits; and that neither the petitioner nor anyone on his behalf suggested at that hearing that the matter be determined on its merits *only* if the decision was to be favorable to the

petitioner, nor would such suggestion have been received by the Commission as it would be tantamount to prejudging the case in favor of the petitioner instead of determining it on its merits.

They further show that the mere technicalities of Presbytery having appointed a Commission instead of electing one, and of the Synod of Illinois having appointed a Commission instead of electing one and not having had a hearing but considering the matter only on the record, were not jurisdictional; *that the fact was that the petitioner had been given a full hearing by the Commission of Presbytery and that a voluminous record had been compiled, and that he was heard extensively orally before the Permanent Judicial Commission of the General Assembly and did have extensive briefs filed on his behalf before that body, and that he did, by the prayer of his appeal and orally, ask the Permanent Judicial Commission to determine the appeal on its merits.*

They further show that *the General Assembly did not have a hearing de novo but it had a regular hearing on an appeal* and that *it affirmed the action of the Presbytery* of Chicago of December 2, 1940, and therefore *the removal of the Minister dates from December 2, 1940.*

This Federal Court Case.

On January 13, 1943, the petitioner, in his own name, filed this the third case in the Chicago District Court.

The petitioner claimed that at the time of filing this suit he was a resident of Indiana and, therefore, that there was diversity of citizenship (R. 2). This suit is *for salary and pension commencing November 1, 1940* (R. 3). It is therefore *for the period immediately following that covered by the suit of the petitioner's assignee Norton* in the State Court, the Illinois Appellate Court, and the Illinois Su-

preme Court about outlined. The suit of and assignment to Norton were limited to the period ending November 1, 1940 (R. 10).

This suit is *for the pension*, although in said State Court case of *Norton* v. *Church*, it was *determined that the pension had been abandoned and was barred by laches.*

This suit is also *for salary at the rate of $5,000 per year*, although in said State Court case, it had been determined that the *salary had been legally reduced by agreement of the parties in 1933* to $2,400 per year and raised in 1936 *to $2,500 per year.*

This suit is based on the contention that the *petitioner's removal* as Minister of defendant Church was *not in accordance with all of the fine technicalities* which the petitioner asserts must be complied with by the Church Courts; and, although *he admits he has rendered no service since December 1, 1940* for the respondent, he contends he is entitled to be paid his full pension and his full salary at the rate of $5,000 per year after November 1, 1940.

Respondent filed a motion for summary judgment. This was based on the judgment of the General Assembly approving the action of the Chicago Presbytery in removing the petitioner as Minister of the respondent Church on December 2, 1940. It was also based on the verdict, judgment and decree of the State Court and the opinion of the Illinois Appellate Court in the above case of *Norton* v. *Church*. It was also based on the fact that the defendant gave checks to the petitioner for his salary for November and December, 1940, at the rate of $2,500 per year so that he was paid in full to January 1, 1941, although his services had terminated November 10, 1940. Copies of the checks and endorsements appear in the Record on pages 32 and 33. It will be noted that the respondent endorsed on the back of each check the words "Endorsement of this check acknowl-

edges receipt in full for salary in full for and to November 30, 1940" and again "to December 31, 1940," but that the petitioner cashed the checks after placing the additional endorsement thereon: "on account."

Several affidavits were filed. Several oral arguments were had and several briefs were filed.

On June 29, 1943, the District Court entered summary judgment for the respondent. The District Court's Memorandum appears in the Record commencing at page 77. The District Court's finding of Fact and Conclusions of Law appear in the Record commencing at page 90. These sustained the respondent's contentions that *the petitioner was legally and properly removed as Minister as of December 2, 1940 by the Church Courts and that accordingly all claims for salary and pension and other claims based on his "Call" as Minister of the defendant Church were barred after December 2, 1940*, the date of his removal as Minister, also that the prior State Court case of *Norton* v. *Church* was *res judicata* or an estoppel by verdict of the two issues therein: (1) That the salary had been legally and properly reduced by agreement of the parties to $2,500 per year and paid in full to November 1, 1940, and (2) That the pension had been abandoned by agreement of the parties and was barred by laches, and also that plaintiff had been paid for November and December 1940 at the rate of $2,500 per year and that he had thus been paid in full.

It is clear from this statement of facts that the grounds on which certiorari is sought are not well founded. *The only material fact necessary to support the minister's removal was admitted, i. e., his having suit filed for upwards of $25,000 against his own church for salary and pension which he had agreed to waive 7 years before*, an action calculated to destroy the peace and harmony of the church and rightly found by Presbytery to require the minister's re-

moval. Other "facts" sought to be injected into the case are immaterial or are legal questions.

Petitioner has gone outside of the Record (Brief, pp. 9, 25) to give a "layman's" opinion that Judge Lindley should have disqualified himself because he and Judge Wham sit in the same District. He fails to say that they hold Court in Danville and Cairo as well as East St. Louis and that Judge Lindley's principal court is at Danville, while Judge Wham's is at East St. Louis. He also fails to say that Judge Lindley often sits on the Seventh Circuit Court of Appeals. We are not informed whether Judge Wham sat on Synod's Committee. Perhaps it is as relevant to say that neither Judge Lindley nor Judge Wham has ever worked for a church for 7 years under an agreement reducing salary and abandoning pension and then repudiated the agreement and carried on extensive litigation calculated to destroy it. Neither did either, when practicing law, permit a client to masquerade under a "*pro se*" in order to gain the Court's sympathy or to cast aspersions on the Court below.

THE REASONS GIVEN FOR THE ALLOWANCE OF THE WRIT ARE INSUFFICIENT.

1. There are no material facts in dispute. The only material fact necessary to support the minister's removal was admitted, *i. e.*, that the minister caused a suit to be filed for upwards of $25,000 against his own church for salary and pension which he had agreed to waive 7 years before, an action calculated to destroy the peace and harmony of the church.

2. The question involved is not important. Petitioner has not been deprived of a right of trial by jury or by Court. A jury trial was had on the issue of the reduction of petitioner's salary (1933) after which he had accepted checks endorsed in full at the reduced rate for 7 years. A hearing was had by the State Court on the issue of the abandonment (1933) of the pension. The Illinois Appellate Court upheld the respondent on appeal and the Illinois Supreme Court denied petitioner's Petition for leave to appeal. Petitioner had extensive hearings before the Commission of Presbytery, although the only fact necessary for his removal was admitted, *i. e.*, the commencement of said suit against his own church. Petitioner was permitted to argue at length before the General Assembly and extensive briefs were filed on his behalf and considered by that body. Petitioner has had full hearings in many Courts. All material facts were admitted and no genuine issue remained for trial in the District Court. Respondent was entitled to judgment as a matter of law in this case. If anyone is aggrieved it is the respondent which has been forced to defend itself against unfounded charges in three cases, each being taken by petitioner to the highest Court possible.

ARGUMENT.

I.

Civil Courts will not adjudicate civil rights when conditioned on the continued existence of the pastoral relation and such relation has been terminated by the decision of a competent ecclesiastical tribunal.

Petitioner has cited a large number of cases, most of which arose in jurisdictions other than Illinois, to support the proposition that the Courts will protect a Minister's salary and pension if deprived thereof by improper ecclesiastical procedure. He argues that a full hearing upon proper notice must be granted. He argues that his pastorate was not properly dissolved by the church courts. He argues at length for strict compliance with all technicalities and for a government of laws and not of men. With broad brush and large canvas he highlights the history of the struggle for freedom in the church.

We agree that church courts should be fair in dealing with ministers and churches. A full hearing should be accorded to the parties except in flagrant cases where the facts are clear and prompt action is necessary to avoid great harm being done to one of the parties. Accordingly we make no special mention of the cases cited by petitioner. We suggest, however, that those cases sustain the jurisdiction of church courts to dissolve the pastoral relation in the manner and under the circumstances of this case.

A careful reading of the opinion of the General Assembly (R. 8) shows that many hearings were given the petitioner, a voluminous record was compiled, extensive briefs were filed, and a number of attempts were made by the Commission appointed by Presbytery to adjust the

matter prior to the time Presbytery dissolved the pastoral relation. It also discloses that the General Assembly's Permanent Judicial Commission reviewed the entire record carefully, had the benefit of the entire file of Presbytery's Commission, and the pertinent minutes of Presbytery and Synod, and furthermore that it heard the detailed oral arguments of both parties and considered extensive briefs filed by them.

True, Presbytery's Commission should have been elected rather than appointed, but it did not itself dissolve the pastoral relation; that was done by Presbytery which had this broad power. Chapter 10, Sec. 7 of the Constitution provides:

> "That the Presbytery has the power to ordain, install, *remove* and judge ministers * * * to visit particular churches for the purpose of inquiring into their State and redress difficulties that have arisen in them * * * and, in general, to order whatever pertains to the spiritual welfare of the churches under their care." (R. 14.)

The opinion states that Presbytery did not abuse its discretionary power in deciding that the peace and harmony of the defendant church "could not be maintained in the face of that suit, * * *" (R. 14). The opinion further points out that this action did not in any way affect the ecclesiastical standing of the petitioner as a minister in the Presbyterian church. The opinion further states:

> "Under this provision it has been repeatedly held that, in appropriate cases, Presbytery has the broad general power to dissolve the pastoral relation existing between a pastor and his Congregation *without a meeting of the Congregation, without any request by either the Congregation or the pastor, even over their protest, and without citation.*" (Emphasis added.) (R. 14.)

The opinion further states:

> "While the pastoral relation could not be dissolved

by the Commission itself, Presbytery, under its broad power, could itself act upon the report of the Commission and could take into consideration the recommendations of its Commission and the information afforded in its report. * * * The Presbytery did not abuse its discretionary power in deciding that the peace and harmony of the church in its charge could not be maintained * * *." (R. 14.)

The opinion further states:

"The action of Presbytery itself was taken at a stated meeting. The plaintiff had actual notice that the matter of dissolution would come up at that meeting, and had refused to comply with the conditions which the Commission suggested for a postponement of action. He had been heard fully before the Commission and information concerning his contentions were embodied in the report of the Commission." (R. 15.)

Thus the situation is that the sections of the Constitution cited by counsel for plaintiff requiring full hearing and oral argument were actually complied with; and that the non-compliance with other provisions, such as referring the matter to appointed Commissions instead of elected Commissions, did the plaintiff's case no harm; and that, under Chapter 10, Section 7 of the Constitution, Presbytery does have the power to remove a minister without hearing in extraordinary cases in which the facts are clear in order to avoid further harm being done. This obviously is sound practice as the welfare of a church and its Congregation should be paramount under circumstances such as existed in this case.

We respectfully call the court's attention to the following cases:

In *Chase* v. *Cheney*, 58 Ill. 509, it was sought to enjoin an ecclesiastical court from proceeding with the trial of a minister. The injunction was granted, but this decision

was reversed by the Supreme Court. At page 537 the Court said:

> "Freedom of religious profession and worship cannot be maintained, if the civil courts trench upon the domain of the church, construe its canons and rules, dictate its discipline, and regulate its trials. * * * The civil power may contribute to the protection, but cannot interfere to destroy or fritter away."

The Court in the case of *Fussell* v. *Hail,* 233 Ill. 73 at page 77 said:

> "Church tribunals ought to perform their functions honestly, impartially and justly, with due regard to their constitutional powers, sound morals and the rights of all who are interested; but if tyranny, force, fraud, oppression or corruption prevail, no civil remedy exists for such abuse except where it trenches upon some property or civil right. The ordinary courts have no cognizance of the rules of a religious organization or other voluntary association, and cannot consider whether they have been rightly or wrongly applied."

In *Presbyterian Church* v. *Cumberland Church,* 245 Ill. 74 at page 92 the Court said:

> "While it must be admitted that an ecclesiastical court cannot adjudicate upon and determine a civil or property right, (*Fussell* v. *Hail, supra*) we think the great weight of authority in this country is to the effect that the civil courts, in adjudicating upon civil and property rights in those classes of church contentions to which this case belongs, are bound by the adjudications of the ecclesiastical court as to which of the contending factions in the church is the true representative of the church and which faction is outside of and beyond the pale of the church, and that the civil courts will decree the title of church property to belong to the faction in the church which the ecclesiastical courts have held to be the true representative of the church."

In the case of *Barton* v. *Fitzpatrick*, 187 Ala. 273, at page 280 the Court said:

> "The pastor of a church in his pastoral office performs a spiritual function. Spiritualities are beyond the reach of the temporal courts. It follows that a church which has employed a pastor, though the employment be for a fixed term and at a fixed salary, may at any time, so far as the civil courts are concerned, depose him from his spiritual office, subject only to inquiry by the courts as to whether the church, or its appointed tribunal, has proceeded according to the law of the church; nor can the payment of his salary, though in arrear, be made a condition precedent to his deposition."

In *Connitt* v. *The New Prospect Reformed Protestant Dutch Church*, 54 N. Y. 551, the minister, Connitt, had been removed and the question was whether he was entitled to any salary after the date of his removal, May 3, 1869. The court stated that the minister had been removed by the church authorities and that his right to a salary terminated at the moment of his removal. Among other things the court said:

> "* * * the civil courts must take the decisions of the ecclesiastical courts as final and binding upon the parties."

It should be noted that the Illinois cases cited by counsel were *flagrant cases of disregard of substantial rights* of one of the parties. Thus, in the case of *Schweiker* v. *Husser*, 146 Ill. 399, it is stated at page 435 that:

> "There is no pretense that any proceedings were instituted against these members in the forms prescribed by the Discipline, or that any jurisdiction was vested in the Quarterly Conference in the only way possible, viz., by appeal. In fact, there is an entire absence of any showing of Disciplinary measures instituted or carried on under the rules of the Association, or that the body which is alleged to have expelled them had any authority in the premises."

II.

Technical errors in the procedure of a competent ecclesiastical tribunal do not give civil courts jurisdiction to review its actions when the parties have been accorded a full hearing and consideration has been given to their respective contentions and substantial justice has been done.

It is apparent that the Premanent Judicial Commission of the General Assembly included in its opinion references to the irregularities of Presbytery and Synod solely for the purpose of instructing those bodies concerning correct procedure for the future so that the objections raised by the plaintiff would not again be raised; but that, so far as the plaintiff's case was concerned, *these irregularities did not deprive him of his rights.*

The opinion states as to the procedure of Presbytery:

> "This irregularity, however, did not affect the substantial rights of the parties, nor did it affect the discretion of Presbytery. The question before us is not one of irregularity, but one of power and discretion. The power existed. The discretion was exercised and was not abused." (R. 15.)

It is clear from Chapter 10, Section 7 of the Constitution of the Presbyterian Church quoted above that Presbytery has power to remove ministers without hearing in extraordinary cases. It is obvious from the opinion of the General Assembly in this case that *this power will be used sparingly, yet, nevertheless, the power necessarily exists.* It is also obvious that the Illinois Supreme Court has recognized this power as shown by the above quotations from Illinois cases.

True, there is always an exception where substantial rights are ignored resulting in damage. But that is not

the situation here. It is clear that a full hearing and thorough consideration was given to the plaintiff's contentions and that, if all of the fine technicalities contended for had been complied with, the result would have been the same.

III.

The General Assembly did not hold a trial de novo but heard the matter on appeal, and petitioner requested it to hear the matter on appeal by his complaint to the General Assembly.

The hearing before the General Assembly was one on appeal. The opinion is in the form of an opinion on an appeal. The opinion is dated May 25, 1942, but it approves the action of Presbytery in removing the minister on December 2, 1940 (R. 15).

Furthermore, Petitioner's complaint to the General Assembly prayed:

> "That the Presbytery of Chicago be directed to expunge from its minutes the record of its action in dissolving the pastoral relationship * * *" (R. 82).

Judge Holly said as to this prayer:

> "This, it seems to me, puts directly in issue the legality of the action of the Presbytery and justified the General Assembly in passing upon the merits of the controversy * * *" (R. 82, 83).

Petitioner's contention that he only requested the General Assembly to hear the matter in order to reverse but not to affirm was first advanced by his lawyer in the lower courts. We believe the fallacy in this facile contention is apparent. No further request by the petitioner was necessary to give the General Assembly jurisdiction. The fact that his oral request was noted in the General Assembly's Opinion (R. 13) merely serves to show the great

lengths to which the General Assembly went to accord every consideration to petitioner. Petitioner's denial now that such oral request was made by him does not raise a material issue of fact any more than would be raised if respondent should now contend that this Petition could only be heard if decided in favor of respondent. We respectfully submit that petitioner's contention and affidavits on this point confirm the wisdom of his removal as there should be the utmost good faith between a minister and his church.

IV.

There is no genuine issue as to any material fact. The respondent is entitled to a summary judgment as a matter of law.

Petitioner argues for another trial. He points to immaterial facts as to which he has deliberately created a conflict. He insists on technical application of technical rules. He injects large constitutional issues. He demands his rights—all of them. He seeks, in this manner, to obscure the one material fact in this case, a fact which he is forced to admit because it is well established by Court records, *i. e.*, that in 1940 he abrogated an agreement made with the respondent church 7 years before to reduce his salary and abandon his pension and caused suit to be commenced against his own church for upwards of $25,000, an action calculated to destroy the peace and harmony of respondent church and which made his removal mandatory.

Nor does Petitioner mention the jury trial and the hearing before the State Court and the hearing and the briefs and the opinion in the Illinois Appellate Court, nor his petition for leave to appeal to the Illinois Supreme Court which was denied. He fails to point out that said State Court case is *res judicata* of the entire pension issue and

of the issue of the reduction of his salary to $25,000 per year.

Nor does petitioner mention the many full hearings which he had before the Commission of Presbytery and his extensive oral argument and briefs filed on his behalf before the General Assembly; nor that these hearings were given him long after he had forfeited all rights to be heard.

Nor does petitioner mention that the "Call" of 1928 was without termination date and so was terminable at will.

Rule 56 must have some useful purpose. Surely it is made for a much-tried case of this character to serve as a warning to litigious litigants that their various litigations must sometime come to an end.

V.

Contracts of employment specifying no definite duration can be terminated at will.

One peculiarity of the contract involved in this case is apparent from a reading of it: It contained no provision specifying how long it was to last. It is submitted that the omission of any time provision has an important effect on petitioner's case.

It is settled in the law of Illinois that contracts of employment specifying no duration are terminable at will.

Davis v. *Fidelity Fire Insurance Co.*, 208 Ill. 375, 384-5.

Orr v. *Ward*, 73 Ill. 318, 319.

Fuchs v. *Weibert*, 233 Ill. App. 536, 538.

Odell v. *Chicago Great Western R. R. Co.*, 212 Ill. App. 616.

Chadwick v. *Morris & Co.*, 170 Ill. App. 569.

In *Fuchs* v. *Weibert*, 233 Ill. App. 536, the Appellate Court for the 4th district said at p. 538:

> "There is a conflict in the decisions of other courts, but in this state it is well settled that an employment upon a monthly or annual salary, if no period is otherwise stated or proved for its continuance, is presumed to be a hiring at will, which either party may at any time determine at his pleasure without liability for breach of contract. *Pfund* v. *Zimmerman*, 29 Ill. 269; *Orr* v. *Ward*, 73 Ill. 318; *Davis* v. *Fidelity Fire Ins. Co.*, 208 Ill. 375; *Marquam* v. *Domestic Engineering Co.*, 210 Ill. App. 337; *Odell* v. *Chicago Great Western R. Co.*, 212 Ill. App. 616. That rule is supported by the great weight of the authorities, *Warden* v. *Hines*, 25 L. R. A. (N. S.) 529 note; *Resener* v. *Watts, Ritter & Co.*, 51 L. R. A. (N. S.) 629 note; *Moline Lumber Co.* v. *Harrison*, 11 A. L. R. 466 note."

In *Orr* v. *Ward*, 73 Ill. 318, the Supreme Court said at page 319:

> "A complete answer to the breach assigned is, the contract contains no undertaking on the part of Cleveland Johnson & Company to retain or continue appellee in the service of the firm for any definite period. We are to judge of the contract by what it contains. Having reduced it to writing, we must presume the parties have embodied in it their entire agreement. It contains no stipulation the firm will retain appellee for two years, or any other fixed period. Their undertaking is to pay him at a certain rate of compensation, if he shall discharge the duties assumed by him to be performed. No doubt it is true each party contracted on the supposition the business would continue through the space of two years, but appellant's firm did not obligate themselves to continue it for that length of time. As a matter of fact, it terminated much sooner. We have no authority to add to the contract as the parties have made it, enlarging the liability of either one of them, and have no disposition to do so."

In *Chadwick* v. *Morris & Co.*, 170 Ill. App. 569, the Appellate Court for the First District said on page 570:

> "We do not think plaintiff's testimony tends to prove a definite hiring for a year at $1,500 or that the contract was so understood by both parties. The plaintiff testified: 'I told him (Borders) that the least I would go for was fifteen hundred a year; and he said "all right".' This can in no way be constructed into a definite hiring for one year. (*Brunnell* v. *Rosenberg*, 126 Ill. App. 196; *Pfund* v. *Zimmermann*, 28 Ill. 269.) The evidence shows that the minds of the parties met only as to the amount or rate of compensation.
>
> "The term of employment was at will, and if the defendant was in good faith dissatisfied with the plaintiff and his work it had the right to discharge the plaintiff even though its dissatisfaction was not founded in reason. (*Alexis Stonware Mfg. Co.* v. *Young*, 59 Ill. App. 226; *Gray* v. *Wulff*, 68 id. 376; *Griffin* v. *Domas*, 22 id. 203.)"

The engagement of a minister is a temporal matter, rather than a spiritual matter (*Evangelican Lutheran St. Paul Congregation* v. *Hass*, 177 Wis. 23; 187 N. W. 677, 681). Therefore, if there is anything in the ecclesiastical law which conflicts with the law of Illinois, the former must yield to the latter (*In re St. Mary's Church*, 296 Pa. 307; 145 Atl. 862, 864).

Thus it is clear that the respondent had the legal right to terminate the petitioner's contract of employment. This is doubly clear under the circumstances surrounding the termination.

VI.

There is an estoppel by verdict, or res judicata, of the two issues: (1) All questions concerning the pension and (2) The amount of the salary (reduced to $2,500 per year) by the case of Norton v. Normal Park Presbyterian Church.

The law is well settled that any matter in issue in an action before a competent court is conclusively settled by the judgment or decree therein and cannot again be litigated between the parties and their privies.

Thus in *Leopold* v. *City of Chicago*, 150 Ill. 568, at page 573, the court said:

> "It is said, however, that there can be no estoppel by judgment, for the reason that the causes of action are not identical in the two proceedings. This, if it be conceded, is not conclusive of the estoppel. Where the former adjudication is relied upon as an absolute bar, there must be, as between the two actions, identity of parties, of subject matter and cause of action. There is however, a clearly defined distinction between that class of cases, and where some controlling fact, or matter material to the determination of both causes, has been adjudicated in a former proceeding in a court of competent jurisdiction, and the same fact or matter is again at issue between the same parties. In this latter case, the adjudication of the fact or matter in the first suit will, if properly presented, be conclusive of the same question in the latter suit, irrespective of whether the cause of action is the same in both suits or not. This is generally denominated estoppel by verdict. This distinction is clearly stated in *Hanna* v. *Read*, 102 Ill. 596, *Wright* v. *Griffey*, 147 id. 496, and *Attorney General* v. *Chicago and Evanston Railroad Co.*, 112 id. 520. In the latter case the late Mr. Justice Scholfield, after quoting from the case of *Hanna* v. *Read*, said: 'This doctrine is limited to matters neces-

sarily involved in the litigation, but it is equally applicable whether the point was, itself, the ultimate vital point, or only incidental, but still necessary to a decision of the case.' "

It is clear that there is an estoppel, although the petitioner in the first case was the assignee of the petitioner in this case. It is clear that there was privity between Norton and the petitioner herein. Thus in *Towle* v. *Quante*, 246 Ill. 568, the court said:

" 'The term privity denotes mutual or successive relationship to the same rights of property.' (I. Greenleaf on Evidence,—15th ed.—sec. 189; *Union Nat. Bank* v. *International Bank*, 123 Ill. 510.) This relationship may be by operation of law, by descent, or by voluntary or involuntary transfer from one person to another. 'All privies are in effect, if not in name, privies in estate. They are bound because they have succeeded to some estate or interest which was bound in the hands of its former owner.' (Freeman on Judgments,—3rd ed.—sec. 162; *Orthwein* v. *Thomas*, 127 Ill. 554.) Privies are estoppel from litigating that which is conclusive upon him with whom they are in privity. (*Hunt* v. *Haven*, 52 N. H. 162; 32 Cyc. 393, and note; 6 Words and Phrases, p. 5607.)"

The petitioner herein was the original owner of the claim which Norton sued upon. The assignment to Norton was limited to the period ending October 31, 1940. This left title in the petitioner herein for all claims accruing on and after November 1, 1940. That is the reason that the complaint herein is for salary and pension on and after November 1, 1940. The petitioner herein was thus privy to Norton in two respects: (1) As the assignor and (2) As the successor in title.

The Illinois courts have held that the petitioner's salary was reduced in 1933, and that nothing was paid by either party at any time on the pension and that the pension was officially abandoned in 1933. Thus in *Norton* v. *Church*,

318 Ill. App. 233, the court said (R. 40), in discussing the salary change:

> "* * * we think the overwhelming weight of the evidence is to the effect that the Congregation and the minister agreed to such a reduction * * *."

The court further said (R. 41):

> "Upon a careful consideration of all the evidence in the record we have reached the conclusion that no verdict could stand except one for defendant."

It is thus clear that the Illinois courts have definitely held that the petitioner's salary was lawfully reduced to $2,500 per year.

The Illinois courts also held that the pension had been abandoned. Thus in *Norton* v. *Church* (R. 41) the court quoted from the minutes of the annual meeting of the Congregation held April 5, 1933, "at which the Rev. LeDuc was present and participated":

> "Accumulating pension funds discussed, Treasurer reports the matter was taken up with the Board and they informed us that the minister had not joined the Pension Fund, and he informed us that he did not care to belong to it; * * *."

The minutes of said meeting may be found in full commencing at page 28 of the Record.

The appellate Court also had the following to say concerning the pension (R. 42):

> "From this it appeared that the church and the Rev. LeDuc paid nothing into the pension fund, that it is clear that this matter was abandoned by both parties. In these circumstances, we think the court correctly dismissed the 'separate action in Chancery.'"

One of the grounds for the respondent's motion to strike the Chancery court in said case was "laches" (R. 26). The trial court in that case struck that count "for want of equity" (R. 27). The District Court also found that the

motion to strike in the State Court was based on "laches and failure of performance by the minister" (R. 109).

The Illinois law is clear that under the circumstances surrounding this pension, the petitioner had been guilty of laches. As we have stated above, at the time he filed his first law suit in the State courts, he had paid nothing into the pension fund for 12 years.

In *LeGout* v. *LeVieux*, 338 Ill. 46 at page 51 the court said:

> "When a court of equity is asked to lend its aid in the enforcement of a demand that has become stale there must be some cogent and weighty reasons presented why it has been permitted to become so. Good faith, conscience and reasonable diligence of the party seeking its relief are the elements that call a court of equity into activity, (*McDearmon* v. *Burnham*, 158 Ill. 55; *Castner* v. *Walrod*, 83 id. 171; *Carpenter* v. *Carpenter*, 70 id. 457;) and the absence of any one of these elements is fatal to a recovery. There is no difference in the application of this doctrine whether it is interposed as against relief sought by an original or a cross-bill. (*Wilcoxon* v. *Wilcoxon*, 230 Ill. 94.) Appellant admits full knowledge of all the facts. His only excuse for not asserting any rights which he may have had was ignorance of the law. *Ignorantia legis neminem excusat* is an old maxim, which is applied in this State as to ignorance of the laws of this State. (*Marshall* v. *Colman*, 187 Ill. 556.) It would be impossible to administer the law if ignorance of its provisions were a defense thereto or could be used as an excuse for non-compliance therewith. (*Untermehle* v. *Norment*, 49 U. S. (L. ed.) 655.) Appellant, with full knowledge of the facts, having allowed any rights which he might have had to lie dormant, as shown by the evidence in the case, the court was fully justified in dismissing the cross-bill."

VII.

Even a Minister has no right to change the endorsement from "in full" to "on account" and then cash a check and use the proceeds thereof and later contend that he was not paid in full.

The petitioner received from the respondent two checks for the months of November and December, 1940, each at the rate of $2,500 per year. On the November 30, 1940 check, the respondent endorsed on the check the following:

> "Endorsement of this check acknowledges receipt in receipt in full for $208.33 salary in full for & to Nov. 30th, 1940." (R. 32.)

A similar endorsement was placed on the back of the December 31, 1940 check by the respondent stating that it was:

> "In full for salary in full for $208.36 to Dec. 31st, 1942." (R. 33.)

Obviously the year was intended to be 1940.

The petitioner, a minister of the gospel, endorsed on the back of these checks following the above endorsements, the words, "*on account*" (R. 32, 33) and then cashed the checks and used the proceeds. He thereafter claimed that he had not been paid in full for November and December, 1940, and in this suit is suing for an additional amount for those two months at the rate of $5,000 per year.

A very small amount is involved for the months of November and December, 1940. However, the manner in which the petitioner, a minister of the gospel, handled this small matter should be very illuminating to the court in determining whether or not the church court did substantial justice to him by removing him as minister of respondent church in order to avoid further harm being done by the petitioner to the respondent church.

We take it that ministers, perhaps, have some slight advantage in matters of courtesy and respect which are generally accorded to them because of their calling. However, we do not know of any law which sets them apart in the matter of cashing checks.

The rule is well established in Illinois that any person, including ministers, receiving a check endorsed "in full" must either accept it as such, or return it to the maker.

Thus in *Ostrander* v. *Scott,* 161 Ill. 339 at page 345 the court said:

> "It was the right of the plaintiff to accept the check upon the terms proposed, or to reject it; but there could be no modification of the terms by his will alone, without the concurrence of the defendant."

If the contention is made that the petitioner was entitled to be paid on the basis of $5,000 per year and that it could not be settled by a lesser amount, then we again call attention to the State Court case of Norton *vs.* Church which fully established that the $5,000 salary had been reduced in 1933 to $2,400 per year, and raised in 1936 to $2,500 per year and paid regularly to the plaintiff on that basis. Even assuming that there was a *bona fide* dispute over the amount, the acceptance of the check on the $2,500 per year basis operated as an accord and satisfaction. Thus in *Worth H. Coal Co.* v. *Parker-W. Co.,* 157 Ill. App. 199 at page 204 the court said:

> "* * * but if the amount due is unliquidated and there is a *bona fide* dispute as to how much is due, a payment of the amount claimed by the debtor to be due, in full settlement, if accepted by the creditor is a satisfaction of the claim."

MOTION TO EXPUNGE.

A motion is hereby made that the two paragraphs concerning Judge Lindley and Judge Wham appearing on page 9 and page 25 of the Petition be expunged because of the scandalous and irrelevant matter therein.

Green v. *Elbert,* 137 U. S. 615, 624.

Supreme Council v. *Green,* 237 U. S. 531, 546.

Conclusion.

The Summary Judgment in the District Court was proper.

1. Petitioner was removed as minister of respondent church December 2, 1940 by a competent ecclesiastical tribunal. He had many hearings, detailed arguments and extensive briefs were filed. Substantial justice was done in that case. Claims for salary and pension are barred by the judgment of the Church Court. He was paid in full to January 1, 1941, almost a month after the time he was removed as minister, and almost two months after the time he ceased to render service to the defendant. There is no genuine issue as to any material fact.

2. The contract of employment or "Call" failed to specify the term of employment and accordingly it was a contract at will. The contract was legally terminated by the respondent.

3. The case of Norton *vs.* Church is *res judicata* or estoppel by verdict of all claims for the pension and for salary above $2,500 per year.

4. Respondent gave two checks to the plaintiff for his November and December, 1940, salary with endorsement thereon of salary "in full." The petitioner cashed these checks and cannot now assert that he was only partially paid for those two months.

The petitioner is a minister who has now vigorously litigated against his own church in three different cases, carrying each of them to the highest court possible. Having filed this suit for salary and pension for a period beyond the time when he was employed, he is likely to commence other suits for salary and pension for later periods. Great harm is being done to the respondent church and we venture the opinion that the petitioner, by his litigious attitude and actions, is doing harm to himself.

It is therefore respectfully submitted that the petition should be denied.

Respectfully submitted,

BENJAMIN WHAM,
Attorney for Respondent.